No. 92-2038

In the Supreme Court of the United States

OCTOBER TERM, 1993

ASGROW SEED COMPANY, PETITIONER

v.

DENNY WINTERBOER AND BECKY WINTERBOER, D/B/A DEEBEES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA C. BIDDLE
WENDY M. KEATS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The Plant Variety Protection Act (PVPA), 7 U.S.C. 2321-2583, generally grants the breeder of a novel variety of a sexually reproduced plant the exclusive right to sell that variety for an 18-year period. That right is enforceable by a civil action for infringement in federal district court. The PVPA exempts from infringement liability, however, certain sales of "saved seed" between farmers. 7 U.S.C. 2543. The questions presented are:

1. Whether the Federal Circuit, which has exclusive jurisdiction over appeals from district court decisions in infringement actions under the PVPA, correctly interpreted the "saved seed" exemption to allow farmers to sell up to half of each crop they produce from a PVPA-protected variety to other farmers for use as seed.

2. Whether a sale of seed pursuant to the "saved seed" exemption must comply with the requirement in 7 U.S.C. 2541(6) that, in order for a sale to be non-infringing, it must be made with notice of the seed's status as a protected variety.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Plant Variety Protection Act of 1970 (PVPA or Act), 7 U.S.C. 2321-2583, grants patent-like protection to the breeders of novel varieties of sexually reproduced plants. Sexually reproduced plants are those produced by seed, rather than by asexual methods such as grafting, budding, and cuttings. 7 U.S.C. 2401(f); see *Kim Bros.* v. *Hagler*, 167 F. Supp. 665, 667 (S.D. Cal. 1958), aff'd, 276 F.2d 259 (9th Cir. 1960). They include a number of major agricultural crops in

the United States, such as soybeans, cotton, wheat, barley, oats, and rice.[1]

Under the PVPA, the breeder of a novel variety of a sexually reproduced plant may apply to the Secretary of Agriculture for a certificate of plant variety protection. 7 U.S.C. 2421; see also 7 U.S.C. 2402(a). The application must show that the variety has (1) "[d]istinctness" from existing varieties; (2) "[u]niformity in the sense that any variations are describable, predictable and commercially acceptable"; and (3) "[s]tability," in the sense that the variety, when reproduced, generally "will remain unchanged with regard to its essential and distinctive characteristics." 7 U.S.C. 2401(a). Such applications are ruled upon by the Plant Variety Protection Office (PVPO) established within the Department of Agriculture. 7 U.S.C. 2481, 2482.

A certificate of plant variety protection covers "seed, transplants, and plants" of the novel variety. 7 U.S.C. 2401. It certifies that the owner of the variety has the right, for a period of 18 years:

> to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom, to the extent provided by this chapter.

7 U.S.C. 2483(a). A separate section of the Act, 7 U.S.C. 2541, specifies that it infringes an owner's rights to:

> (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it; [or]

[1] Plants reproduced by asexual methods are afforded patent-like protection under a separate statute, the Plant Patent Act of 1930, ch. 312, 46 Stat. 376, 35 U.S.C. 161-164.

* * * * *

> (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or
>
> (4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or
>
> * * * * *
>
> (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received.

The provision of the Act primarily at issue in this case, Section 2543, describes certain actions that do not infringe certain of the owner's rights:

> **Right to save seed; crop exemption**
>
> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced

> on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

An owner whose rights have been infringed may bring a civil action against the infringer. 7 U.S.C. 2561. Jurisdiction over such actions lies exclusively in the federal district courts. 28 U.S.C. 1338(a). Appeals from decisions of the district courts in infringement actions lie exclusively in the Federal Circuit. 28 U.S.C. 1295(a)(1).

b. Respondents Dennis and Becky Winterboer own a farm in Clay County, Iowa. In 1990, they planted 265 acres of soybeans on their farm, using two novel varieties of soybean. Both varieties were covered by certificates of plant variety protection assigned to petitioner Asgrow Seed Company. Pet. App. 4a, 16a, 35a; see also Pet. 4. The planting produced 10,529 bushels of soybeans suitable for seeding purposes, all of which the Winterboers sold to other farmers for use as seed. Pet. App. 4a, 35a; see Pet. 4-5. Such sales of harvested seed by one farmer to another for seeding purposes are known as "brown bag sales."[2]

2. Asgrow brought this infringement action against the Winterboers in the United States District Court for the

[2] Harvested soybeans can be used for reproduction purposes—*i.e.*, as seed—or for consumption purposes, such as for animal feed or human consumption. The PVPA uses several terms to describe the former type of use, including "growing purposes" (7 U.S.C. 2541), "reproductive purposes" (7 U.S.C. 2543), and "seeding purposes" (*ibid.*). There appears to be no difference in the meaning of those terms relevant to this case, and we therefore use the terms interchangeably.

Northern District of Iowa. Asgrow alleged that the Winterboers' brown bag sales of soybeans produced from Asgrow's two novel varieties violated 7 U.S.C. 2541(1), which prohibits the sale of a novel variety; 7 U.S.C. 2541(3), which prohibits the sexual multiplication of a novel variety as a step in marketing it for growing purposes; and 7 U.S.C. 2541(6), which prohibits the dispensing of a novel variety without notice that the variety is protected under the Act. The Winterboers argued that the sales did not violate those provisions because they fell within Section 2543. See Pet. App. 16a-18a.

The district court granted summary judgment in favor of Asgrow, holding that the Winterboers' sales were not exempt from infringement liability under Section 2543. Pet. App. 15a-26a. The court read the first sentence of Section 2543 to "allow[] a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year." Pet. App. 21a. In the court's view, the farmer then could sell the seed that has been saved for replanting purposes (but no more) if the farmer's plans changed, for example, because of a change in market conditions. *Id.* at 22a.

Because the Winterboers "admittedly have sold much more than" was necessary to replant their soybean acreage (Pet. App. 24a), the district court concluded that they had violated 7 U.S.C. 2541(1) and (3).[3] The court permanently enjoined the Winterboers "from selling seed, except for saved seed, to other farmers," Pet. App. 24a, but it deferred ruling on damages, *id.* at 24a-25a.

3. The court of appeals reversed. Pet. App. 1a-14a. It concluded that "[t]he district court erred in * * * read[ing] the crop exemption [in Section 2543] to limit brown bag sales of novel varieties to the maximum amount of seed the selling

[3] The court found it unnecessary to determine whether they also had violated 7 U.S.C. 2541(6). Pet. App. 25a.

farmer would save to plant another crop of like size." Pet. App. 10a.[4]

The court of appeals did, however, discern other limits on the sale of seed under Section 2543. First, the court held that "a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed." Pet. App. 6a. Second, the court noted that "[b]oth the buyer and seller of brown bag seed must be farmers," and that "their primary farming occupation * * * must be to grow crops for sale as food or feed, rather than to grow crops for sale as seed." *Id.* at 7a. In the court's view, the determination of a farmer's "primary farming occupation" must be made "on a crop-by-crop basis." *Id.* at 8a. Under that approach, a farmer may sell up to (but not including) 50% of each crop produced from a PVPA-protected variety to other farmers for seeding purposes, as long as the farmer sells the rest of that crop for consumption purposes. *Ibid.* Third, the court determined that the reference to Section 2541(3) in the opening clause of Section 2543 limits brown bag sales of seed by "clarif[ying] that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." Pet. App. 12a. The court believed that, in construing Section 2541(3), "[a]n expansive reading of the term 'marketing' would swallow the entire crop exemption." Pet. App. 12a. The court accordingly held that subsection (3) reaches only one "form of marketing": namely, "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended mer-

[4] The court of appeals believed that the district court erred in reading the phrase "for seeding purposes" in the first sentence of Section 2543 as modifying the verb "saved." Pet. App. 11a. Instead, the court of appeals determined, the phrase modifies "obtained," and describes the purpose for which seed is obtained from the owner of the variety, not the purpose for which a farmer may save the seed produced from seed obtained from the owner. *Id.* at 11a-12a.

chandising or retail activities." Pet. App. 12a-13a. The court of appeals left it for the district court to decide on remand whether the Winterboers had engaged in that form of marketing. *Id.* at 13a.

Finally, the court of appeals rejected Asgrow's argument that brown bag sales are subject to Section 2541(6), which makes it an infringement to "dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety." The court concluded that "Section 2543 * * * exempts farmers who make limited brown bag sales from this requirement." Pet. App. 13a.

4. The court of appeals denied Asgrow's petition for rehearing and, by a six-to-five vote, rejected its suggestion of rehearing en banc. Pet. App. 28a. In a written statement dissenting from the denial of rehearing en banc, Judge Newman expressed the view that the panel "reached an interpretation of [Section 2543] that is contrary to the statute and its purpose" and that "nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." Pet. App. 30a.

DISCUSSION

The Federal Circuit erred in holding that 7 U.S.C. 2543 allows a farmer to sell, for seeding purposes, up to 50% of a crop produced from PVPA-protected seed. Properly interpreted, Section 2543 permits a farmer to sell, for seeding purposes, only that portion of the crop that the farmer originally grew for the purpose of planting another crop. Thus, Section 2543 permits the sale of only a fraction of the amount of seed permitted under the Federal Circuit's erroneous interpretation.

The Federal Circuit's error warrants review by this Court. Congress enacted the PVPA to give plant breeders an economic incentive to develop new and improved varieties of seed. The Federal Circuit's interpretation of 7 U.S.C. 2543 thwarts that purpose by allowing farmers to sell massive amounts of novel varieties of seed at a lower price than the developers of

those varieties must charge to take into account the costs and risks of development. Unless corrected, the Federal Circuit's decision is likely to discourage the development of novel varieties of seed, to the detriment of the American public and the competitiveness of American agriculture in world markets.

1. The Federal Circuit misinterpreted Section 2543. That provision permits a farmer to sell, as seed, only the portion of a crop produced from PVPA-protected seed that the farmer grew for the purpose of saving and using it to plant another crop. That means, as a practical matter, that the amount of seed that a farmer can sell, as seed, is limited to the amount reasonably necessary for the same farmer to produce another crop.

a. The first sentence of Section 2543 consists of two parts: an opening clause, followed by a proviso. The opening clause allows a farmer, subject to the restrictions set forth in Section 2541(3) and (4), to save seed produced by the farmer from PVPA-protected seed and to use that saved seed for certain purposes. The proviso to the first sentence allows the farmer to sell that "saved seed" to other farmers for seeding purposes.[5] The question in this case is: How much of the seed produced by a farmer from PVPA-protected seed may be saved, under the opening clause of Section 2543's first sentence, so as to be sold, as seed, to another farmer under the proviso to the first sentence?

The answer to that question, we submit, is found in Section 2541(3). Section 2541(3) is relevant because the opening clause of Section 2543 expressly provides that a farmer may neither "save" seed nor "use" it, if to do so would constitute an infringement under Section 2541(3) (or under Section 2541(4), which proscribes use of protected seed to produce a hybrid and

[5] The second sentence of Section 2543 allows a farmer to sell the crop that the farmer has produced from PVPA-protected seed for consumption purposes.

which is not implicated here). Section 2541(3), in turn, provides that it is an infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety." 7 U.S.C. 2541(3). We think that this provision limits the *purposes* for which a farmer may save seed under the opening clause of the first sentence of Section 2543 and, consequently, also limits the *amount* of seed that may be saved and then sold as seed.

Under the opening clause of Section 2543, the farmer may save the seed "produced by him from" PVPA-protected seed. Under Section 2541(3), however, the farmer may not have "produced"—*i.e.*, "sexually multipl[ied]"—that seed "as a step in marketing" the seed "for growing purposes." Thus, if the farmer has "produced" the seed for the purpose of "marketing" it as seed, the farmer's conduct violates Section 2541(3) and falls outside of the protection of Section 2543.

The Act does not define the term "marketing." In the absence of a statutory definition, it is appropriate to assign the word its common meaning. See, *e.g.*, *Federal Deposit Insurance Corp.* v. *Meyer*, No. 92-741 (Feb. 23, 1994), slip op. 5. In common usage, "marketing" encompasses "selling."[6] Applying that meaning of the term in Section 2541(3) leads to the conclusion that a farmer may not plant a PVPA-protected variety and thereafter save the seed produced by the planting

[6] See *Webster's Third New International Dictionary of the English Language* 1393 (1986) (defining "marketing" to mean "the act of selling or purchasing in a market; * * * an aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing, and supplying market information"); *The Random House Dictionary of the English Language* 1177 (2d ed. 1987) (defining "marketing" to mean "the act of buying or selling in a market[;] * * * the total of activities involved in the transfer of goods from the producer or seller to the consumer or buyer, including advertising, shipping, storing, and selling").

with the purpose of selling it for use as seed. The farmer must act with some other purpose.[7]

The other, permissible purposes for which a farmer may produce and save seed from PVPA-protected seed are set forth in the opening clause of Section 2543. The farmer may "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." 7 U.S.C. 2543. In other words, the farmer may use the saved seed produced from protected seed only in order to produce another crop, which the farmer in turn may use on his or her own farm (for example, for animal feed, personal consumption, or replanting) or may sell to others in accordance with the second sentence of Section 2543. Under the opening clause of Section 2543, therefore, the farmer, having obtained PVPA-protected seed, may plant that seed and save, from the resulting crop, enough seed to plant another crop, *ad infinitum*. In addition, the farmer may (also under the opening clause) keep the resulting crop for use on the farm (*i.e.*, for personal consumption), or (under the second sentence of Section 2543) sell the resulting crop to others for consumption purposes.[8]

[7] Nothing in the text of Section 2541(3), which refers to "marketing" without qualification, justifies the court of appeals' conclusion that Section 2541(3) prohibits only one "form of marketing," *i.e.*, "extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." Pet. App. 12a-13a. And, as discussed above, the court of appeals' restrictive reading cannot be squared with the ordinary meaning of "marketing," which, even in its narrower denotation, encompasses all selling activities.

[8] The court of appeals misread the portion of the opening clause of Section 2543 that permits a farmer to "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section." The court of appeals believed that the phrase "for sale as provided in this section" modifies the word "seed," and the court accordingly read the clause in which the phrase appears to permit the sale of saved seed. See Pet. App. 7a. In our view, however, the "for sale" phrase modifies the word "crop," so that the clause of which it is a part refers not to the sale of the saved *seed* (as provided in the proviso to the first sentence of Section 2543), but to the sale of the *crop* produced from the saved seed (as provided in the second sentence).

The sale of "saved seed" for use as seed is permitted under the proviso to the first sentence of Section 2543, which states:

> *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

Thus, the seed that a farmer may sell for use as seed under the proviso to the first sentence of Section 2543 is the seed that the farmer is entitled to save under the opening clause of the first sentence. As we have explained above, under the opening clause, the farmer is entitled to save seed only to produce another crop, either for use on the farm or for sale (for non-reproductive purposes). Consequently, as the district court concluded (albeit by somewhat different reasoning), sales of "saved seed" permitted under the proviso to the first sentence of Section 2543 are limited to the seed that the farmer has saved to produce another crop. Pet. App. 21a-24a.[9]

Although the permissibility of selling seed produced from PVPA-protected seed for seeding purposes thus turns on the purpose for which the farmer produced the seed, we think that in infringement actions the courts would ordinarily not need to conduct an elaborate inquiry into the farmer's subjective intent at the time of planting; it would be appropriate for a

[9] We agree with the court of appeals (Pet. App. 11a-12a) that the phrase "for seeding purposes," on which the district court relied (*id.* at 21a), does not modify "saved"; rather, it modifies "obtained," and refers to the purpose for which the seed was obtained by authority of the owner.

court to infer the farmer's purpose from the amount of seed that the farmer saved. If the farmer saved more seed than he or she reasonably could use to produce another crop, and thereafter sells that seed to others for use as seed, it would be reasonable to infer that the farmer produced the seed from the outset with the purpose of selling it to others for use as seed, in violation of Section 2541(3). That inference would be especially well founded when, as in this case, the amount of seed that was saved and sold for seeding purposes exceeded by many times over the amount needed for replanting.[10]

b. The interpretation of Section 2543 that we have offered above is buttressed by consideration of the PVPA as a whole. See *Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1565 (1993) (meaning of statutory language depends on context). Congress enacted the PVPA to "afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties." 7 U.S.C. 2581. The primary form of encouragement provided under the Act is the grant of exclusive rights to the developers of new varieties for an 18-year period, including the exclusive right to sell, import, and export a protected variety. 7 U.S.C. 2483(a). Most of the PVPA is devoted to explicating those rights, defining what actions infringe them, and providing for their enforcement through a certification process and private infringement actions.

Section 2543 carves out an exception to the exclusive rights otherwise afforded by the PVPA. Consistent with that function, Section 2543 should be read to permit only those limited sales of saved seed by a farmer that are necessary to prevent

[10] Assuming, as the district court did (Pet. App. 22a n.3) and as petitioner asserts (Pet. 3), that it takes one bushel of soybeans to plant one acre, the Winterboers would have needed to save 265 bushels of soybeans to produce a crop of the same size as the crop they produced in 1990. See Pet. App. 35a. The amount of soybeans that they actually saved, and sold as seed, was more than 38 times that amount: 10,259 bushels. *Ibid*.

wasting of the saved seed if the farmer's replanting plans change. That interpretation affords appropriate financial protection for the farmer, while at the same time protecting the legitimate expectations of the owner of exclusive rights in the novel variety at the time it sold the seed to the farmer. As Judge Newman explained in dissenting from the denial of rehearing en banc, "[t]he statute was not designed to place farmers in the seed business." Pet. App. 32a. Our interpretation of Section 2543 does not permit farmers to plant a novel variety of seed for the purpose of producing seed to sell in competition with the owner of protected rights in the novel variety. The Federal Circuit's interpretation, in contrast, permits farmers to do precisely that with up to half of each crop produced from protected seed. That result cannot be squared with the PVPA as a whole.

c. Our interpretation of Section 2543 is also consistent with its legislative history, which shows that Section 2543 was intended to permit only limited sales of seed by farmers for seeding purposes. There was no provision allowing farmers to sell "saved seed" for seeding purposes in the original versions of the bills that became the PVPA. Instead, those bills included a "saved seed" provision, which allowed a farmer to save only enough of the seed produced from protected seed for replanting, and a separate "crop exemption" provision, which allowed farmers to sell the crop produced from protected seed for consumption (not planting) purposes.[11]

[11] Under the proposed "saved seed" provision, unless the seed was grown as a step in marketing seed or for producing a hybrid, a farmer could have saved seed from a PVPA crop "and grow[n] the resulting variety for his own use." S. 3070, 91st Cong., 1st Sess. § 112 (1969); H.R. 13,631, 91st Cong., 1st Sess. § 112 (1969). Under the proposed "crop exemption" provision, it would not have been an infringement to sell seed saved under the "saved seed" provision "for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose." S. 3070, *supra*, § 114; H.R. 13,631, *supra*, § 114.

The right to sell "saved seed" for seeding purposes was added to the final bill, when the "saved seed" and "crop exemption" provisions were combined into what became Section 2543. As described in the committee reports, Section 2543

> authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970); S. Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970) (same). That description makes clear that under Section 2543 a farmer may sell, for seeding purposes, only such PVPA-descended seed as the farmer has saved for the farmer's own use. Thus, as the district court recognized, Congress contemplated only sales of limited amounts of seed, occasioned by a change in the selling farmer's planting plans. Pet. App. 22a.

d. The Federal Circuit recognized that "without meaningful limitations, [Section 2543] could undercut much of the PVPA's incentives." Pet. App. 12a. The limitations the court adopted, however, find no support in the text or legislative history of the Act.

The Federal Circuit based its holding that a farmer may sell up to 50% of a crop as brown bag seed upon its interpretation of the requirement in the proviso to the first sentence of Section 2543 that both the seller and the buyer of saved seed have, as their "primary farming occupation," the "growing of crops for sale for other than reproductive purposes." 7 U.S.C. 2543. The Federal Circuit adopted a "crop-by-crop" approach to determining whether that requirement is satisfied, reasoning that, as long as 50% or more of each crop is sold for non-

reproductive purposes, the farmer's "primary farming occupation," with respect to that crop, is the growing of the crop for sale for non-reproductive purposes. Pet. App. 8a. Nothing in the text or legislative history of Section 2543, however, suggests that courts should use a crop-by-crop approach instead of, for example, an approach based on the primary source of the farmer's total income. The Federal Circuit's adoption of a crop-by-crop approach seems to have been influenced more by a desire to impose some limit on its otherwise unbounded interpretation of Section 2543 than by a desire to divine the meaning that emerges from the statutory text.

There is likewise no support in the text of Section 2543 for the court's determination that a farmer who purchases brown bag seed cannot save any portion of the seed produced from it. See Pet. App. 6a; p. 6, *supra*. Section 2543 permits a farmer to save seed "produced by him from seed obtained, or *descended from* seed obtained, by authority of the owner of the variety." 7 U.S.C. 2543 (emphasis added). Brown bag seed is plainly "descended from" seed obtained by authority of the owner.

As discussed above, the operative limitation on the amount of saved seed that a farmer may sell under Section 2543 is found in its incorporation of the prohibition in 2541(3) against sexually multiplying a protected variety of seed as a step in marketing it for use as seed. The court of appeals erred by failing to give effect to that limitation, which is imposed by the Act itself, and by adopting other limitations that have no basis in the Act.[12]

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[12] Respondents cite (Br. in Opp. 14-15 & nn.4-6) three documents obtained from the Department of Agriculture that they contend endorse the court of appeals' interpretation of Section 2543. Respondents' reliance on those documents (copies of which we have lodged with the Clerk of this Court) is misplaced. The earliest such document is a 1973 letter from a PVPO commissioner that seeks to answer certain "hypothetical" questions and states that the only limitation on brown bag sales is the requirement that the selling farmer's and the buying farmer's "primary farming

2. a. The Federal Circuit's erroneous interpretation of Section 2543 warrants review by this Court, because it "nullifies" the economic incentive that Congress intended the PVPA to provide for plant breeders to assume the costs and risks of developing new varieties. Pet. App. 30a (Newman, J., dissenting from denial of rehearing en banc). As a result, the decision could seriously harm the public interest and the competitiveness of United States agriculture.

The Federal Circuit's decision allows a farmer to sell up to 50% of the crop produced from PVPA-protected seed to other farmers for seeding purposes. See Pet. App. 8a. That means in the case of soybeans, for example, that in a single crop cycle a farmer may produce and sell, as seed, up to 22 and 1/2 times the amount of soybeans that the owner of the variety sold to the farmer (based on a yield of 45 bushels for each bushel

occupation" be the growing of crops for non-reproductive purposes. The 1973 letter does not address the "marketing" prohibition in Section 2541(3) or indicate to what extent the author's view represents the position of the Department. The second document, a PVPO "Activity Report" from October 1987, concerns the Department's authority to issue regulations concerning the scope of Section 2543; the document says nothing about the meaning of Section 2543. The third document is a report co-authored by a USDA agricultural economist and an outside economist, surveying "Intellectual Property Rights and the Private Seed Industry" (USDA, Economic Research Service, *Agricultural Economic Report* No. 654 (1991)). That report refers (at 4) to a district court decision for the proposition that under the PVPA "49% of a harvest can be sold as seed." The report does not suggest that the Department had independently come to that view. Thus, none of the documents cited by respondents purports to state a formal agency determination regarding the questions of statutory interpretation presented here. It is therefore not surprising that the court of appeals did not cite any of the documents in its opinion, even though respondents cited them in their briefs below. See Resp. C.A. Br. 32-33 & n.21; Resp. C.A. Reply Br. 28-32. In any event, the Department of Agriculture has now carefully considered the questions presented here, and its views are those set forth in this brief.

planted). See Pet. App. 32a n.2.[13] The Federal Circuit's interpretation thus essentially wipes out the value of the owner's "exclusive" right to sell the novel variety.

b. Contrary to respondents' suggestion (Br. in Opp. 16-17), the absence of a conflict among the lower courts with respect to the question presented here does not weigh against further review. No conflict can develop among the courts of appeals, because the Federal Circuit has exclusive jurisdiction over appeals from district court decisions in infringement actions under the PVPA. 28 U.S.C. 1295(a)(1). And no conflict can develop between the Federal Circuit and any state court, because the federal district courts' original jurisdiction over infringement actions is exclusive. 28 U.S.C. 1338. Under these circumstances, the absence of a conflict among the lower courts does not render further review unwarranted. See, *e.g.*, *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2039 (1993).

c. The legislative proposals to which respondents refer (Br. in Opp. 19 & n.9) have little bearing on the need for further review. The proposals cited by respondents are bills introduced in each House of Congress (S. 1406, 103d Cong., 1st Sess. § 9 (1993), and H.R. 2927, 103d Cong., 1st Sess. § 9 (1993)) that would amend 7 U.S.C. 2543 by striking out the proviso to the first sentence of Section 2543, thereby eliminating the authority of farmers to sell "saved seed" to other farmers for use as seed. The bills are intended to implement a provision in the International Convention for the Protection of New Varieties of Plants, Mar. 19, 1991 (known by the French acronym "UPOV") (1991 UPOV), to which the United States is a signatory. Specifically, Article 14(1) of the 1991 UPOV,

[13] By comparison, as we interpret it, Section 2543 would generally permit a farmer to sell, as seed, no more than 1/45 (or about 2%) of the crop produced from a PVPA-protected variety of soybean, which would represent the same amount of seed that the farmer purchased from the owner of the variety to produce the crop. See Pet. App. 11a.

requires prior authorization of the owner before a protected variety may be offered for sale as seed.

The bills are in their most preliminary stages, as respondents concede. Br. in Opp. 19 n.9. The Senate bill was the subject of a hearing before the Senate Committee on Agriculture, Nutrition and Forestry on September 20, 1993, but the bill has not yet been reported out of that committee. There have been no committee hearings on the House bill. Although the President supports the bills as introduced and is urging prompt congressional action on them, it is not clear that Congress will take action during its current session, because the United States is not under any immediate deadline to achieve compliance with the 1991 UPOV.[14] Action on the bills during the current session of Congress is also uncertain because of controversy over other aspects of the bills unrelated to the "saved seed" exemption.

In any event, even if the bills were enacted in their current form, further review of the decision below would be warranted. In their current form, the bills would amend the PVPA prospectively; the amendments would not affect the rights of holders of current certificates of plant variety protection issued under the PVPA, with respect to varieties covered by such certificates or by applications for such certificates on file at the time the amendments are enacted.[15] Thus, the

[14] The 1991 UPOV will not enter into force until at least five countries, including at least three current UPOV members, have deposited their instruments of accession (1991 UPOV, Art. 37), which has not yet occurred. In the meantime, U.S. breeders who hold PVPA certificates continue to enjoy certain protections under the 1978 UPOV, with which the United States has achieved compliance, and they would continue to enjoy those protections even if the United States were not to ratify the 1991 UPOV, since the United States would continue to be a member of UPOV under the 1978 Convention. See 1991 UPOV, Art. 31.

[15] See S. 1406, *supra*, § 12(a) (providing that, with exceptions not pertinent here, "any variety for which a certificate of plant variety protection has been issued prior to the effective date of this Act, and any variety for which an application is pending on the effective date of this Act, shall continue to be governed by the Plant Variety Protection Act * * *, as in effect on the day before the effective date of this Act"); H.R. 2927, *supra*, § 12(a) (same).

decision below, unless reversed by this Court, will permit farmers to sell, for seeding purposes, up to 50% of each crop produced from varieties protected by current certificates, regardless of whether the bills are enacted. Because some of those certificates will remain in effect for as long as 18 more years, the decision below will have a continuing adverse financial impact on the breeders of novel varieties for years to come. It is reasonable to expect that such financial harm will lead breeders to cut back their investment in the research and development of novel varieties. See American Seed Trade Ass'n Amicus Br. 11-14. Such a result would be detrimental to the public interest and directly contrary to the text and express purposes of the PVPA. See pp. 12-13, *supra*.

d. Finally, although respondents do not raise the point in opposing certiorari, we note that the interlocutory posture of this case does not detract from its suitability for review. This case presents a pure issue of statutory interpretation, and the decision below resolves that issue in a definitive manner. Further proceedings on remand are unlikely to shed any light on the proper resolution of the issue or to diminish its importance.[16] In similar circumstances, the Court has granted

[16] The court of appeals left for remand the question whether the Winterboers' sales were exempt from infringement liability under the court's interpretation of Section 2543. Pet. App. 12a. It is possible that the sales would not be entirely exempt under that interpretation. For example, it appears that the Winterboers sold, for use as seed, more than 50% of the crops they produced from PVPA-protected seeds. See *id.* at 4a, 35a. In addition, it is unclear whether the Winterboers engaged in "marketing," as the court of appeals understood that term. See *id.* at 12a-13a. Nonetheless, we do not believe, on balance, that the possibility that Asgrow would prevail on remand counsels against further review at this time. For each

certiorari to review legal determinations by a court of appeals, even though the underlying litigation could conceivably be resolved on other grounds. See, *e.g.*, *Gollust* v. *Mendell*, 111 S. Ct. 2173 (1991); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, No. 92-854 (argued Nov. 30, 1993).[17]

planting season that the Federal Circuit's erroneous (yet binding) interpretation of Section 2543 remains in effect, the developers of novel varieties of seed will suffer significant economic losses, and investment in the development of novel varieties will be stifled, causing harm to the public interest.

[17] The court of appeals also held that sales of saved seed permitted by Section 2543 are not subject to the requirement in Section 2541(6) that the seller of PVPA-protected seed provide notice to the purchaser of the protected status of the seed. Pet. App. 13a. Although petitioner challenges that holding in Question 2 of its petition (at i), we do not believe that the issue whether Section 2541(6) applies to brown bag sales would, standing alone, warrant review of the decision below. Our view is due in part to uncertainty about whether the issue was properly before the panel, and to the fact that it was not fully briefed, as Judge Lourie noted in his concurring opinion. Pet. App. 14a; see also *id.* at 25a (district court declines to rule on Section 2541(6) issue). Nonetheless, if the Court concludes that the first question presented warrants certiorari, it would be appropriate to grant certiorari on the second question as well. A determination of whether a farmer who makes brown bag sales of seed must provide notice to the purchaser that the seed is protected under the PVPA would be important in any infringement action against the purchaser. See 7 U.S.C. 2567 (damages recoverable only from infringer who had notice that he or she was selling a protected variety).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA C. BIDDLE
WENDY M. KEATS
Attorneys

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